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In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Respondent
~~Plaintiff~~

VS.

~~SABINE IRRIGATION COMPANY AND~~
C. H. ALBERDING

Petitioner
~~Defendants~~

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May Defendant, C. H. Alberding, be classed as an employer under an extension of U.S. CA Title 29, Sec. 203(d), which defines "employer" as "any person, acting directly or indirectly in the interest of an employer in relation to an employee", where said Defendant owns no shares of stock in Sabine Irrigation Company, the actual employer, has never assumed any supervision over the operation of the company, had never even met an employee prior to late October 1978, had never in any way participated in their employment or the fixing of their pay or other renumberation, and had only acted as a banker in advancing money to the Company after it got in financial distress in 1974.

2. The ruling of the Fifth Circuit, in this case, is in direct conflict with the ruling of the Eighth Circuit in *Wirtz vs. Pure Ice Company,* 322 F.2d 259 and *Brennan vs. Plaza Shoe Company,* 522 F.2d 843 and, with its own prior decision, in *Wirtz vs. Lone Star Steel Company,* 405 F.2d 688.

PARTIES WHOSE JUDGMENT IS TO BE REVIEWED

This Judgment is sought to be reviewed only as to C. H. Alberding, who, along with Plaintiff, are the only parties here involved, and their names are shown in the foregoing caption.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR

Plaintiff

VS.

SABINE IRRIGATION COMPANY AND
C. H. ALBERDING

Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. H. ALBERDING hereby petitions that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, entered January 14, 1983.

OPINIONS BELOW

The Rulings and Opinions of the Courts below include only (a) a Memorandum Ruling of the Trial Court entered on November 30, 1981 (A-1)[1], (b) Judgment of the Trial Court rendered on December 29, 1981 (A-16), (c) the Trial Court's ruling by which Petitioner's application for rehearing was denied on December 29, 1981 (A-21), and (d)

[1] "A" followed by a number indicates a page in the Appendix.

the decision of the Court of Appeals for the Fifth Circuit affirming the Judgment of the Trial Court, rendered on January 14, 1983 (A-23).

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on January 14, 1983. This petition for Writ of Certiorari is being filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

This action involves the Federal Labor Statutes, the pertinent parts of which are found in USCA, Title 29, Sections 203(d), 206(a), and 217. We quote the pertinent divisions of these sections as follows:

Section 203(d) provides that:

> " 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

In Section 206(a), it is provided that:

> "Every employer shall pay to each of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

> (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;"

In Section 217, relating to injunction proceedings, it is provided that:

> "The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title)."

STATEMENT OF THE CASE

This is a suit brought by the Secretary of Labor, under the Fair Labor Standards Act (FLSA), against Sabine Irrigation Company, Inc. (Sabine) and its President and Vice President, C. H. Alberding and J. E. Scally, respectively, for judgment, for wages due Sabine's employees, because of the failure to meet the minimum wage requirement under FLSA, and enjoining said Defendants, as employers, from withholding pay due them from October 17, 1976 to November 27, 1978.

The jurisdiction of the District Court, in which this suit was filed, was determined by the basic involvement of the Federal Labor Standards Act.

Both Alberding and Scally denied that they were employers since neither of them had owned any Stock in Sabine since the early 1960s, or had, at any time, participated in the operation of Sabine, or in the employment of its workmen or the fixing of their rates of pay.

This suit was dismissed as to Scally, who retired June 1, 1976, but judgment was rendered against Sabine and Alberding for the amount of $24,227.81 due Sabine's employees, plus accrued interest amounting to $8,644.90 computated to December 4, 1981 and enjoining them from withholding payment of these amounts. The judgment further ordered distribution of the unpaid compensation. Appeal from this judgment was taken by Alberding, who is the only Appellant.

This case should unquestionably have been dismissed as to the Appellant, C. H. Alberding, as well as to J. E. Scally, since there is not one word of evidence in the record which indicates that he (Alberding) (1) held any stock in Sabine (2) ever, at any time, participated in the operation of the business, (3) was, at any time, connected in any way, with the employment of its employees or the fixing of their rates of pay, or (4) that he even knew an employee until October 1978, just before Sabine discontinued its operations. The records shows further that Mr. Alberding visited Vinton, where Sabine's business was headquartered, only twice during the distressed period of the company, from 1974 until 1978, one of these visits was to see Mr. Bond, Sabine's Manager, who was then terminally ill, and the second visit was to advise that he could no longer finance

Sabine's business and that it would therefore, discontinue operations in November 1978. It is true that Mr. Scally, in 1974, on the request of Mr. Bond, secured from the Labor Relations Office in Tulsa, information regarding rates of pay for agricultural workers and sent these rates to Mr. Bond (Scally Deposition 18, 19, Ex. P-9). In doing this, he suggested to Mr. Bond that he secure information from the Labor Relations Office in Lake Charles, Louisiana (Scally Dep. 19) and be guided thereby.

The extent of Alberding's interest in Sabine was limited to the advancement of funds, during its distressed period (1974-1978) to prevent it from going into bankruptcy. During this period, the bookkeeping and financial affairs were handled out of the Tulsa, Oklahoma Headquarters for some 30 hotels of which Alberding was principal owner. The work in handling this operation was done principally by Marian Covington and Shirley Goddard, who worked for Alberding's hotel companies, and their predecessors, without cost to Sabine. Mr. Alberding, who lived in Chicago, contacted his Tulsa offices two or three times a week, but the record does not show that these contacts were about Sabine. Presumably, they were about his numerous hotels, which he personally supervised. The Trial Judge, unfairly and without justification, held that, through these contacts, he (Alberding) exercised "pervasive" control over Sabine's operations.

As to this, Appellant says that his position regarding Sabine was never more than that of a banker, who advanced money for Sabine's operations during its time of distress. As above stated, this position is fully supported by the record.

ARGUMENT

On the basis of the record, and without the unfair inferences made by the Trial Judge, the judgment should not have been rendered against Appellant, C. H. Alberding. This, we say solely because the record fails completely to support the judgment rendered and the injunction issued against him.

I. ALBERDING IS NOT AN EMPLOYER UNDER THE ACT.

As shown in the foregoing statement of facts, the record shows, without dispute, that Alberding was not a stockholder in Sabine and that he performed none of the acts necessary, under any other Court's interruption of Sec. 203(d) of the Act, to classify him as an employer. If the judgment of the lower Courts to the contrary is permitted to stand, any banker who finances a farmer could receive the same treatment suffered by Alberding. This must be corrected in order to avoid the possibility of such a result.

A case supporting the view above stated is *Wirtz vs. Pure Ice Co.,* Eighth Cir., 222 Fed.2d 259. Suit in this case was filed, under the Federal Labor Standards Act, against Pure Ice Company and Vance M. Thompson, President and *principal stockholder.* The facts and ruling of this case are shown in the following quotation therefrom:

> "He visited the Pure Ice Plant two or three times a year but had nothing to do with the hiring of the employees or fixing of their wages or hours. When Wanda Lee became manager, a fact to which Thompson was unaware for some time after it occurred, the only change in the situation was that he was consulted with reference to

> mechanical difficulties of plant operation. Thompson was an investor in this and other corporations and enterprises. There is no substantial evidence to support a finding that he was an "employer" within the meaning of the Act. That he might have taken over and acted*****in the interest of an employer (the corporation) in relation to an employee' is beside the point as long as he did not do so. If we had here a combination of stock ownership, management, direction and the right to hire and fire employees, then a contrary conclusion would be well supported. As it is, the issue being one of fact and the trial court having refused to hold Thompson as an employer, and its conclusion being supported by substantial evidence, this court may not set it aside. *Kalmon Shoe Mfg. Co. v. Commissioner,* 8th Cir., 1963, 321 F.2d. 189; *Fitt's Estate v. Commissioner,* 8 Cir., 1956, 237 F.2d 729, 733; *Coates v. Commissioner,* 8 Cir., 1956 234 F.2d 459, 463.****Here is little question but what *Thompson as the majority stockholder and dominant personality in Pure Ice Company, Inc.,* could have taken over and supervised relationship between the corporation and its employees had he decided to do so. A careful reading of the record, however, indicates that he did not do so." (underscoring ours)

In *Pure Ice,* the Defendant, Thompson, was unquestionably the president and principal stockholder of his Company. He visited the plant at least twice each year and was consulted by its manager regarding mechanical difficulties. He was held *not* to be an employer, but was enjoined from any *future* violation of the Act. Alberding, though nominally the president of Sabine, was not a stockholder, received no compensation, and, contrary to the ruling of the Trial Court, he never participated in the supervision of the company's operations, even to the

extent that Mr. Thompson did in *Pure Ice.*

In *Shultz vs. Mack Farland,* Eighth Cir., 413 Fed. 2d 1296, the Court found that McFarland was the founder, president and general manager of his corporation and clearly exercised the right of hiring and firing his employees. The Court indicated that this made McFarland liable as an employer and specifically found that:

> "Thus the record shows that Mr. McFarland is the founder, president, and sole investor in both corporations; that he set the management policy for each corporation; that he continues to exercise authority over the hiring and firing of supervisory personnel as well as their hours, work assignments and rates of pay; that after 'my brother quit me' at the Pompano establishment, he 'pulled the personnel back down to Hollywood and ran it out of there'. In short, he was, by his own admission, at all times the 'top man'.**** Here, McFarland put up all the capital for both corporations. Money talks. It talked through McFarland who ran the corporations as his venture into the roofing business in Broward County."

The factual findings, in these cases, make it clear that *Pure Ice* gives perfect support to Alberding's position in this case. The language of *Mack Farland* also gives support to Alberding's position but, because of the distinguishing facts of his case, the defendant, McFarland, was properly held to be an employer. Again we say that Alberding owned no stock and did not participate, to any degree, in the conduct of Sabine's operations or the hiring and fixing of the rates of pay of its employees. He only covered financial shortages, when necessary, to keep the company in operation.

The injunction was, of course, improperly issued against Alberding. He was *not* an employer and therefore was not properly the object of legal restraint in the case. In addition, there could not have possibly been any type of "enterprise" between Sabine's operations and the hotel business conducted out of the same office in Tulsa, Oklahoma, during the period of Sabine's financial difficulties.

In the first place, Sabine was a distinctively separate and different sort of operation. Its business was in agriculture, which supplied water to rice farmers and was operated exclusively in the rice growing area of Southwest Louisiana. The other corporations, whose business was handled out of the Tulsa Office, were hotel and apartment owning concerns (being thirty (30) or more in number) operated in the Southerly and Southwest parts of the United States. Though one-half of the canal system was transferred to Washington Youree Company, which at one time had owned and operated a hotel in Shreveport, Louisiana. This operation was long ago discontinued and its sole ownership, at that time, was the Sabine Canal System. Of greater importance, though, is the fact that the business of irrigation was clearly a different type of operation from the hotel business, and was necessarily localized in the rural areas of Southwest Louisiana. The hotels, of course, were located in the cities, in which they were operated in a completely different manner from the rice irrigation business.

Secondly, there was no common ownership between the two companies, nor were they under common supervision or control. During this period, Sabine was first run by Mr. Bond and later by Gerald Clark and Mrs. Bond. The hotels, of course, were operated by the various hotel managers who had nothing whatever to do with the operation of Sabine.

In *Wirtz vs. Hardin & Company*, 253 F.Supp. 579 (affirmed, Fifth Cir., 359 F.2d 792), it was found that several different retail grocery stores, owned principally by members of a single family, did not constitute an "enterprise", where their books were kept by a single accountant and their bills were paid principally from his office. In passing on the question, the Court observed (586) that:

> "The Report of the Senate Labor Committee states that the activities of separate business entities should be treated as an enterprise 'where they are joined either through unified operation or common control into a unified business system or economic unit to serve a common business purpose'. Senate Report No. 145, 87th Congress, 1st Session (April 12, 1961). In this case, the facts as determined by the Court establish that the operations of the businesses here involved are not unified or under common control but to the contrary are separate and independent and that the businesses do not in any sense constitute a unified business system or economic unit. Similarly, the facts of this case are that each store operates for its own separate and distinct business purpose and not to serve a common business purpose."

Other cases supporting this point are *Brennan vs. Ashy*, 397 F.Supp. 1347 (affirmed, 5th Cir., *Dunlop vs. Ashy*, 355 F.2d 1228) and *Brennan vs. Plaza Shoe Store, Inc.*, 522 F.2d 845."

We accordingly ask that Certiorari be granted herein and the judgment of the Court of Appeals, affirming the judgment of the District Court, be reversed as to Alberding.

II. WRIT OF CERTIORARI MUST BE ISSUED BECAUSE OF CONFLICT WITH DECISION OF OTHER CIRCUIT:

As shown by our foregoing discussion of the *Pure Ice* and *Mack Farland* cases, there exists between the decision of the Fifth Circuit Court of Appeals in this case, and the decisions in those cases, a clear conflict of view on the question as to whether or not a nominal officer of a corporation, who has no investment in it and has never participated in the operation of the company or the employment of its employees or the fixing of their rates of pay, can be legally classed as an employer, under the FLSA.

We will not again quote from *Pure Ice* and *Mack Farland*, but do point out that in *Pure Ice*, the President of the company, who was a principal stockholder, and twice or more each year visited the plant and discussed its operation with its manager, the fixing of their rates of pay, was under these circumstances, held *not* to be an employer. In *Mack Farland*, the defendant, Mr. McFarland, was held to be an employer, but the language of the case indicated that, had the circumstances been the same as those in this case, he would *not* have been held to be an employer.

There is unquestionably a direct conflict between the judgment rendered by the Eighth Cir. in the Pure Ice and Mack Farland cases and the judgment of the Fifth Circuit rendered in this case. Not only is this true, but as already pointed out, if the decision of the Fifth Circuit in this case is permitted to stand, without change, banks will in the future be restrained in the making of loans to farmers or to people engaged in supplying them with water.

CONCLUSION

For the reasons stated in the foregoing pages hereof, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit herein, which should be reversed.

Respectfully submitted,

_____

William L. McLeod, Jr.

_____

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RAYMOND J. DONOVAN,
Secretary of Labor,
United States Department of Labor

VS. CIVIL ACTION NO. 791419

SABINE IRRIGATION
COMPANY, INC., ET AL

Messrs. or Madams

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(Filed Nov. 30, 1981)

VERNON, JUDGE

MEMORANDUM RULING

I. Introduction

This is a civil action brought by the Secretary of

Labor, United States Department of Labor, pursuant to Section 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq, hereinafter referred to as the Act), to enjoin defendants from violating the minimum wages found by the court to be due defendant's employees under the Act, together with interest thereon at the rate of nine percent per annum from the dates such amounts became due. Trial was had to the court, sitting without a jury, on May 27, 1981.

Plaintiff claims that the defendants employed a number of persons to supply the labor necessary to furnish water for irrigating agricultural products; that these employees were engaged in the production of goods for commerce within the meaning of the Act, 29 U.S.C. § 203(j); and that therefore the defendants were subject to the minimum wage provisions of the Act. Plaintiff further contends that defendants willfully violated the minimum wage provisions of the Act within the meaning of Section 6 of the Portal-to-Portal Act of 1947 (29 U.S.C. § 255). Plaintiff seeks an injunction restraining defendants, Sabine Irrigation Company, Inc., C. H. Alberding, and J. E. Scally, from future violations of the Fair Labor Standards Act and from withholding the payment of minimum wages due defendant's employees under the Act.

Defendants concede that Sabine Irrigation Co., Inc. was an employer within the meaning of the Fair Labor Standards Act and therefore subject to the minimum wage provisions of the Act, but contend that defendants Alberding and Scally exercised no supervision or control over Sabine's employees and therefore are not employers within the meaning of Section 3(d) of the Act. In the alternative, defendants contend that they did not willfully violate, if at all, the minimum wage provisions of the Act within the

meaning of Section 6 of the Portal-to-Portal Act of 1947 (29 U.S.C. § 255), and therefore the two year statute of limitations period should apply.

After considering all the evidence adduced at trial and having had the benefit of memoranda submitted by the parties, the court makes the following findings of fact and conclusions of law:

II. Findings of Fact

1. Defendant Sabine Irrigation Company, Inc. (hereinafter Sabine), was at all times material to this action, a Louisiana corporation within the jurisdiction of this court.

2. Defendant Alberding, a non-resident of Louisiana, was, at all times material to this action, president of Sabine and subject to the jurisdiction of this court.

3. Defendant Scally, a non-resident of Louisiana, was, at all times material to this action, vice-president of Sabine and subject to the jurisdiction of this court.

4. At all times material to this action, Sabine was engaged in the business of pumping water from the Sabine River through a canal into the rice fields of west Calcasieu Parish, Louisiana. Sabine's operations were essential to the growth and production of rice, most of which was subsequently transported outside the state of Louisiana.

5. To carry on this irrigation business, Sabine employed men to operate and maintain the pumping station, check and repair levees, weed canals, and construct and maintain bridges, gates, flumes and underpasses. The court finds that these men were employed as "irrigation

workers" rather than "agricultural workers" and as such were entitled to minimum wages of $2.20 per hour in 1976, $2.30 per hour in 1977 and $2.65 per hour in 1978.

6. Although the testimony is in conflict as to whether defendants Sabine, Alberding and Scally had knowledge of the application of the Fair Labor Standards Act to their employment practices prior to 1976, the court finds that there is sufficient evidence to charge all defendants with knowledge of the existence of the Act.[1]

7. At all times material to this action, Sabine's business address, as evidenced by correspondence, income tax returns and checks, was P.O. Box 1379, Tulsa, Oklahoma (hereinafter referred to as Tulsa office). Located under the same roof as Sabine in the Tulsa office, though not carrying the same post office address, were the following corporations: Tulsa Apartments Corporation, Hotel Services Company, Universal Wholesale Supply Company, Sabine Water Canal, Inc., and Washington-Youree Corporation.[2] At all times material to this action, defendant Alberding served as president, defendant Scally as vice-president, and defendant Alberding's wife, B. W. Alberding, as secretary-treasurer of the above listed corporations.

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[1] The Wage-Hour Division of the U.S. Department of Labor investigated Sabine in the early 70's at which time the requirements of the Fair Labor Standards Act were explained. Defendants Alberding and Scally had previously defended against suits for violations of the FLSA in *Brennan v. Rolling Hills Management Corp.*, Docket #71-C-240 (N.D. Okla. 1971); *Dunlop v. Tulsa Apt. Co.*, Civil Action #73-C-309 (N.D. Okla. 1973)—which was dismissed after defendants entered a stipulation of compliance; and *Dunlop v. McAlester Corp.*, Civil Action #75-117-C (E.D. Okla. 1975).

[2] Rolling Hills Management Co., Indian Hills Properties, Inc. and McAlester Corp. were also listed at this office, but they are not relevant to this action.

8. Sabine's stock is currently owned in equal amounts (50% each) by Sabine Water Canal, Inc. and Washington-Youree Corporation. All stock in Sabine Water Canal, Inc. and Washington-Youree Corporation is owned by defendant Alberding's son-in-law, Tucker Moore. All stock in Hotel Services Company is owned in equal amounts (50% each) by defendant Scally and defendant Alberding's wife, B. W. Alberding.

9. Defendant Alberding is president of the Jokake Inn Corporation and the Royal Palms Corporation, both of which operate hotels in Phoenix, Arizona. Defendant Scally and defendant Alberding's wife, B. W. Alberding, serve as vice-president and secretary-treasurer respectively of these corporations. Defendant Alberding owns 50% of the stock in the Jokake Inn Corporation and defendant Scally serves as an advisor to Royal Palms Corporation.

10. At all times material to this action, Sabine's Tulsa office administered the business affairs of Sabine Irrigation Company and defendant Alberding maintained contact with the Tulsa office several times a week. Miriam Covington, an employee of Hotel Services Co., and Shirley Goddard, an employee of Tulsa Apartments Corporation, were responsible for, and did pay, all bills incurred by Sabine Irrigation Company.[3] If there were insufficient funds in the Sabine account, defendant Alberding would authorize Mrs. Covington to transfer funds from the Hotel Services account. On occasion, defendant Alberding would send a personal check or a check drawn on the account of some other corporation to cover the deficiency. All payroll checks for Sabine's employees were cut and mailed from

[3] Mrs. Goddard would cut the checks and Mrs. Covington would sign and mail them. Mrs. Covington had been employed by defendant Alberding for over 30 years.

the Tulsa office and all records regarding payment of Sabine's bills and payroll were kept in the Tulsa office. The Tulsa office deducted federal income tax and social security from the payroll and all records pertaining to these withholdings were kept in the Tulsa office. The Tulsa office handled all insurance arrangements for Sabine Irrigation and ensured that all ad valorem taxes were paid on Sabine real estate. Finally, the Tulsa office handled all Sabine's income tax returns.

11. The day to day affairs of Sabine Irrigation were handled by either Joe or Patricia Bond.[4] As local superviosrs for Sabine, the Bonds tabulated the hours worked by each employee and filled out payroll worksheets which were forwarded to the Tulsa office weekly for payment.[5] They had authority to make routine purchases necessary to carry on maintenance work but had to clear special purchases through the Tulsa office. Although there is conflicting testimony as to whether the Bonds had the general authority to hire and fire employees and fix the rate of pay, the court finds that the Bonds were authorized to maintain a regular workforce, but were required to clear the hiring of additional men through the Tulsa office.[6] The court also

[4] Mr. Bond actively suprevised the men working on maintenance projects for Sabine until he became ill with cancer in 1976. Mrs. Bond assisted him during his illness and took over the position after his death on April 1, 1978. She did not supervise any of the maintenance work. Mrs. Bond worked for Sabine until Mr. Alberding relieved her in October, 1978.

[5] The payroll worksheet contained the name of each employee, the hours worked, the rate of pay, the gross amount before taxes and a total of all the salaries of all employees.

[6] While the evidence establishes that Mr. Bond fired one employee he caught sleeping on the job, the evidence also establishes that the Bonds exercised little or no discretion in the hiring and firing of Sabine's employees. The reason for this is that the job attracted only transient labor which constantly turned over of its own accord.

finds that the Bonds had no independent authority to set a rate of pay or otherwise bargain with individual employees on a wage scale basis. Mrs. Bond's uncontradicted testimony establishes that the Bonds could not grant raises and that new employees were automatically paid the same rate as their predecessors. The Bonds had no authority to write checks on Sabine's Lake Charles checking account and forwarded all bills received from local charge accounts to the Tulsa office for payment. Finally, when rice was sold and Sabine received a check for their one-fifth share, the Bonds either deposited it in the Lake Charles checking account or forwarded it to the Tulsa office.

12. Defendants Alberding and Scally made decisions and took management action which directly affected Sabine Irrigation Company. At all times material to this action, defendant Alberding, through his employee Miriam Covington, exercised pervasive control over Sabine's financial and business affairs. His authorization was needed to make special purchases, to hire extra men and to transfer funds necessary for meeting Sabine's payroll and trade account obligations. In addition, defendant Alberding, along with defendant Scally, had sufficient management authority to make decisions directly affecting Sabine's daily operations.[7] In 1972, defendant Scally was involved with a United States Department of Labor investigation concerning the application of minimum wages to Sabine employees and in 1974 he sent a memo to Mr. Bond instructing him on the wage scale applicable. In February of 1976, defendant Scally executed a note payable to Joe Bond on behalf of Sabine Irrigation and later that same year, denied a request from area rice growers to adjust the water rent

[7] The evidence establishes that in 1977 both defendants considered instituting a policy for Sabine Irrigation regarding a cut-off date for irrigating.

downward. In February of 1979, defendant Scally granted an easement to Continental Oil Company to construct, operate and maintain a pipeline on Sabine Irrigation's land.

13. Sabine's financial records reflect numerous dealings between the named defendants and Sabine Irrigation and other corporations owned and controlled by the defendants. While the testimony was conflicting in this area, it is clear that at various times Sabine Irrigation had financial dealings with Hotel Services Company (of which defendant Scally and defendant Alberding's wife each own 50% of the stock), Sabine Water Canal and Washington-Youree Corporation (all stock of which is owned by defendant Alberding's son-in-law, Tucker Moore), and Jokake Inn Corporation (of which defendant Alberding is president and owner of 50% of the stock).

(a) Sabine's records reflect that in 1978 they held a note receivable from Sabine Water Canal in the amount of $68,768.20 for which Sabine collected interest in the amount of $7,869.10. The records also reflect an account payable at the same time to Sabine Water Canal in the amount of $47,176.48.

(b) In fiscal 1980, the records reflect that Sabine Irrigation paid an unknown "fee" of $10,000.00 to Hotel Services Company after Sabine ceased operations and that defendant Alberding got credit for $12,000.00 in crop damages. In addition, the records show that in 1980, Sabine's salary account was debited $1,666.66 and the Hotel Services Account was credited $1,564.49. Finally, Sabine Irrigation had a net profit in excess of $17,000.00 for 1980.

(c) In fiscal 1979, Sabine records show a net profit

of $93,000.00.

(d) Sabine records reflect that in 1978 a paper transaction took place wherein Sabine Irrigation was credited $19,800.00 and defendant Scally was debited $19,800.00 on the books of the company. In addition, Sabine paid $10,000.00 rent to Sabine Water Canal and $10,000.00 rent to Washington-Youree Corporation.

(e) In 1977, Sabine paid rent totalling $40,000.00 to the corporations mentioned in (d) above, and an additional $7,183.00 toward the upkeep of Alberding's Chicago office. Finally, Sabine paid out $51,000.00 in salaries in addition to the laborers' wages for repair and maintenance of the canal and levee which were listed separately on the profit and loss statement.

(f) In 1976, Sabine Irrigation had income of approximately $200,000.00 out of which it paid rent totalling $70,796.60 to Sabine Water Canal and rent totalling $70,796.60 to Washington-Youree Corporation. In addition, $10,000.00 was paid to Universal Wholesale Supply Company and $12,000.00 was paid to Hotel Services Company. Finally, defendant Scally received a salary of $8,000.00, $3,000.00 was paid toward defendant Alberding's Chicago office and defendant Alberding was credited with $10,000.00 on the books of Sabine.

14. Each of the individuals listed in Sabine's payroll records for the period between October 17, 1976 and November 27, 1978, were employed by Sabine Irrigation Company. These employees were paid for the hours recorded on the face of the payroll records at the hourly wage indicated thereon. These wages were less than the minimum applicable and minimum wages and interest thereon at the

rate of nine percent per annum are owed for the period since October 17, 1976.

III. Conclusions of law

1. Jurisdiction

This court has jurisdiction over the parties and over the subject matter of this action pursuant to Section 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq), hereinafter referred to as the Act.

2. Employers

Defendant Sabine Irrigation Company, Inc. is an employer within the meaning of Section 3(d) of the Act (29 U.S.C. § 203(d)). The question faced by the court is whether defendants alberding and Scally are also employers within the meaning of the Act. Section 3(d) of the Act broadly defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." Whether a person is an employer is essentially a question of fact. According to the Fifth Circuit, this requires that "each case must be considered in light of the total situation or whole activity to determine whether an employer-employee relationship exists." *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968). Furthermore, in considering the total situation, the courts are to "avoid technical concepts of the employment relationship and examine the economic realities presented by the facts of each case." *Wirtz v. Soft Drinks of Shreveport, Inc.*, 336 F.Supp. 950, 957 (W.D. La. 1971).

Applying the "economic reality" test to the facts of this case, there can be no doubt that defendant Alberding

should be held to be an employer. Mr. Alberding is, and has always been, president of Sabine Irrigation Company. Since 1976, Mr. Alberding, through his employee Miriam Covington, has exercised pervasive control over the business and financial affairs of Sabine Irrigation. The evidence is clear that Mr. Alberding maintained continuous contact with his Tulsa office and indirectly controlled many matters traditionally handled by an employer in relation to an employee (such as payroll, insurance, and income tax matters). In addition, the evidence is clear that Mr. Alberding's financial gymnastics directly affected Sabine's employees by making it possible for Sabine to meet its payroll and keep its employees supplied with the equipment and materials necessary to perform their jobs. Thus, we hold that Mr. Alberding is an employer within the meaning of the Act and therefore personally liable along with Sabine Irrigation Co. for any wages found to be due and owing to the employees in question.

Applying this same test to defendant Scally, the court cannot so readily conclude that he should be treated as an employer. Although Mr. Scally was Sabine's vice-president, the Secretary has not established that he maintained contact with either Sabine or the Tulsa office or acted directly or indirectly in the interest of Sabine in relation to its employees at any time pertinent to this action. To support its contention that Mr. Scally should be treated as an employer, the Secretary points to the fact that in early 1976 Mr. Scally executed a note payable to Joe Bond on behalf of Sabine Irrigation; that later that same year Mr. Scally denied a request from area rice growers to adjust the water rent downward; and that in 1979, Mr. Scally granted an easement to Continental Oil Co. over Sabine property. While these facts may be sufficient to establish that Mr. Scally had management authority, they certainly do not

establish that he acted directly or indirectly in the interest of Sabine in relation to its employees.[8] Thus, the court concludes that Mr. Scally is not an employer within the meaning of the Act and therefore cannot be held personally liable for any wages found to be due and owing.

3. Employees Engaged in the Production of Goods for Commerce

Section 6 (a) of the Act (29 U.S.C. § 206(a)) provides that "every employer shall pay to each of his employees who in any workweek is engaged...in the production of goods for commerce...wages at the following rates:..." Furthermore, Section 3 (j) of the Act (29 U.S.C. § 203 (j)) states that "for purposes of this act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing,...or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof,* in any state." (emphasis supplied).

The evidence is clear that at all times material to this action, defendants were engaged in the business of pumping water from the Sabine River through a canal into the rice fields of west Calcasieu Parish, Louisiana. Defendants' operations were essential to the growth and production of rice, most of which was destined for, and subsequently transported, outside the state of Louisiana. To carry on these operations, the defendants employed men to operate and maintain the pumping station, check and repair levees, weed canals, and construct and maintain bridges, gates,

[8] The fact that Mr. Scally instructed Joe Bond on Sabine's applicable wage scale in 1974 is not probative of whether Mr. Scally was an employer between 1976 and 1979, especially in light of the testimony that he was retired as of 1976.

flumes and underpasses. Thus, the court concludes that the defendants' employees were engaged in the production of goods for commerce within the meaning of Section 3 (j) and as a consequence were covered by the Act at all times between October 17, 1976 and November 24, 1978.

Furthermore, the court finds, as the defendants' payroll records clearly show, that at all times material to this action, defendants' employees were paid at the rate of two dollars per hour. Thus, the court concludes that the defendants were in violation of the provisions of Section 6 and 15 (a) (2) of the Act (29 U.S.C. § 206 and 215 (a)(2)) which prescribes minimum wages of $2.20 per hour in 1976, $2.30 per hour in 1977, and $2.65 per hour in 1978.

4. Willfulness

The test for finding willfulness is whether "the employer knew or suspected that his actions might violate the FLSA...Did the employer know the FLSA was in the picture?" *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). The evidence is clear that the defendants previously defended against suits alleging violations of the FLSA on three separate occasions. On one occasion (*Dunlop v. Tulsa Apt. Co.*, Civil Action No. 73-C-309 (N.D. OKLA. 1973)), suit was dismissed after the defendants entered a stipulation of compliance. In addition, defendants had previously been investigated by the Wage-Hour Division of the U.S. Department of Labor. Thus, the court concludes that the defendants had knowledge of the existence of the FLSA. Whether they knew of the changes in the provisions of the FLSA that took irrigation workers out of the agricultural exemption is of no moment.

Since defendants' violations were willful, the statute of limitations for this action is three years (29 U.S.C. § 255(a)), and computation of wages due commences with October 17, 1976. Since the defendants' payroll records indicate the number of hours worked by each employee during the period between October 17, 1976 and November 24, 1978, the amount of back wages due is to be figured by multiplying the difference between the minimum wage and the two dollars per hour actually paid, by the number of hours worked.

5. Injunction

The Secretary seeks to enjoin the defendants from future violations of the FLSA and from withholding minimum wages found to be due for past violations.

Section 17 of the Fair Labor Standards Act (29 U.S.C. § 217) provides, in pertinent part, as follows:

> The district courts...shall have jurisdiction, for cause shown, to restrain violations of Section 15, including in the case of violations of Section 15(a)(2) of the restraint of any withholding of payment of minimum wages or overtime compensation found by the Court to be due to employees under this Act. . ..

An action under this section is not an action "to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest." *Wirtz v. Jones*, 340 F.2d 901, 904 (5th Cir. 1965). As such, an injunction under the Act is designed to stop existing violations and prevent future infractions. It has the effect of shifting the responsibility for compliance with the provisions of the Fair Labor Standards Act onto the employer's shoulders.

Dunlop v. Davis, 524 F.2d 1278 (5th Cir. 1975).

In light of the defendants' prior violations of the Act, this court concludes that they should bear the burden of complying with its provisions. Accordingly, we hold that an injunction restraining future violations of the FLSA and from withholding minimum wages found to be due is necessary and will hereby issue against defendants, Sabine Irrigation Co. and C. H. Alberding.

Counsel for plaintiff should submit a judgment consistent with this opinion within ten days of date.

THUS DONE AND SIGNED at Lake Charles, Louisiana, on this 30th day of November, 1981.

S/S EARL E. VERON
EARL E. VERON
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,
Plaintiff,

v.

SABINE IRRIGATION CO., INC., a Corporation, C. H. ALBERDING, an Individual, and J. E. SCALLY, an Individual,
Defendants.

Civil Action File

No. 79-1419

(Filed Dec. 29, 1981)

JUDGMENT

In accordance with the memorandum ruling signed and entered in this action on the 30th day of November, 1981, it is

ORDERED, ADJUDGED and DECREED that defendants Sabine Irrigation Co., Inc., a corporation and C. H. Alberding, an individual, their officers, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of Section 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201, *et seq.*, hereinafter referred to as the Act in the following manner:

1. Defendants Sabine Irrigation Co., Inc. and C. H. Alberding shall not, contrary to Sections 6 and

15(a)(2) of the Act, 29 U.S.C. Sections 206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate less than the minimum hourly rates required by Section 6 of the Act.

IT IS FURTHER ORDERED that this action insofar as it applies to defendant, J. E. Scally, be, and same hereby is, dismissed.

It is FURTHER ORDERED, ADJUDGED and DECREED that defendants Sabine Irrigation Co., Inc. and defendant C. H. Alberding be, and they hereby are, enjoined from withholding payment of minimum wages in the total amount of $24,227.81 for the period from October 17, 1976 to January 1, 1979, plus accrued interest of $8,644.90 for the period of October 17, 1976 to December 4, 1981. To comply with the provisions of this judgment, defendants Sabine Irrigation Co., Inc. and C. H. Alberding, within thirty (30) days from entry of this judgment, shall deliver to the plaintiff a cashier's or certified check payable to "Employment Standards Administration—Labor" in the total amount of $32,872.91.

It is FURTHER ORDERED, that plaintiff shall promptly proceed to make distribution of such unpaid compensation, less income tax and social security deductions to defendants' employees named in Exhibit A, which is attached hereto and made a part hereof, in the amounts indicated, or to their estate if necessary. In the event that any said money cannot be distributed within the period of one (1) year hereof because of inability to locate the proper person, or because of their refusal to accept such sums, the

plaintiff shall deposit such funds with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. Section 2041.

It is FURTHER ORDERED, that the costs of this action be, and the same hereby are, taxed against defendants Sabine Irrigation Co., Inc. and C. H. Alberding for which execution may issue.

Dated this 29th day of December, 1981.

S/S EARL E. VERON
EARL E. VERON
United States District Judge

EXHIBIT "A"

NAME	BACK-WAGES	INT.	TOTAL
Roy Anderson	$ 41.80	$ 15.02	$ 56.82
Carl Ashworth	577.80	203.51	781.31
Daniel Barlye	31.20	10.25	41.45
Archie Berry	2,509.45	903.36	3,412.81
Curtis Boone	285.60	117.70	403.30
Gerald Breaux	67.60	20.24	87.84
David Brindley	765.25	275.52	1,040.77
Ernest Broussard	2,484.85	894.72	3,379.57
James Burke	1,009.85	386.07	1,395.92
Johnny Burke	169.65	52.07	221.72
Junior Cansler	59.20	26.40	85.60
Carrol Clark	422.40	142.65	565.05
Gerald Clark	1,499.51	551.25	2,050.76
Lee Roy Clark	302.40	113.50	415.90
Malcolm Clark	75.20	33.84	109.04
Robert Clark	57.20	16.30	73.50
William Clark	168.00	64.26	232.26
Feliciana Douget	386.40	153.70	540.10
Carlton W. Doyle	641.60	216.45	858.05
Dwight J. Elkins	812.60	280.14	1,092.74
Calvin T. Foster	48.75	14.64	63.39
Herman Foster	46.00	16.22	62.22
Mike Fountain	1,376.80	495.84	1,872.64
Hubert Gore	218.40	73.80	292.20
Billy Hoffpauir	237.90	76.54	314.44
Harold Hudson	180.05	55.35	235.40
Billy E. Johnson	348.40	114.84	463.24
David Johnson	325.65	97.60	423.25
Morgan Johnson	1,778.40	640.32	2,418.72
Dale Charles Liby	67.60	19.77	87.37
Jay D. McDonald	83.20	24.96	108.16

Collins Mitchell	193.70	59.45	253.15
Pat Nation	690.40	248.16	938.56
Gregory Nealy	240.50	73.80	314.30
Barry Phillips	425.50	114.84	540.34
Darcy Phillips	379.60	140.93	520.53
Donald Phillips	1,690.25	652.86	2,343.11
George Phillips	218.40	65.52	283.92
Douglas Pruitt	489.60	208.38	697.98
Melissa Rasberry	22.40	9.97	32.57
Stephen J. Rodrick	471.25	144.02	615.27
Edward J. Romero	149.50	44.86	194.36
Billy Sanders	28.80	12.15	40.95
Beryl F. Smith	117.00	37.95	154.95
Leilani Jay Spell	72.00	31.46	103.46
Kenneth Stinson	109.20	32.77	141.97
Daniel Vassar	208.00	65.52	273.52
Donald Vincent	892.00	351.22	1,243.22
Zane C. West	36.00	13.64	49.64
Alton Whitman	715.00	230.57	945.57
Total	$24,227.81	$8,644.90	$32,872.91

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RAYMOND J. DONOVAN,
Secretary of Labor, United
States Department of Labor

VS. CIVIL ACTION
NO. 791419

SABINE IRRIGATION
COMPANY, INC., ET AL

RULING ON DEFENDANT'S MOTION FOR NEW TRIAL AND REHEARING

(Filed Dec. 29, 1981)

Defendant, C. H. Alberding, has moved for a new trial in the above captioned matter on grounds that the court erred in finding defendant Alberding to be an employer and in ordering that defendant Alberding be enjoined from further violations of the minimum wage provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 201 et seq.)

After careful consideration of the memoranda submitted by the defendant in support of his motion, the court is of the opinion that its original ruling was correct. Therefore, defendant's motion for a new trial and rehearing is hereby DENIED.

THUS DONE AND SIGNED at Lake Charles,

Louisiana, this 29th day of December, 1981.

S/S EARL E. VERON

EARL E. VERON
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Raymond J. DONOVAN, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee,

v.

SABINE IRRIGATION CO., INC., et al., Defendants,

C. H. Alberding, Defendant-Appellant.

No. 82-3120
Summary Calendar

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1983.

Secretary of Labor sued to enjoin a corporate employer and two individuals from violating the minimum wage requirement of the Fair Labor Standards Act, and to restrain them from continuing to withhold unpaid wages. The United States District Court for the Western District of Louisiana, Earl E. Veron, J., 531 F.Supp. 923, rendered judgment for the Secretary and individual appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) the district court's finding that the individual was an "employer" for purposes of the Act was not clearly erroneous; (2) the evidence of the individual's disregard of the minimum wage requirement was adequate to establish willfulness, thereby triggering the three-year liability provision of the Act; and (3) the district court did not abuse its discretion in restraining the individual from future violations of the Act, and from withholding payment of

statutory minimum wages adjudged due and owing:

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

POLITZ, Circuit Judge:

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act of 1938, as amended ("FLSA" or "Act"), 29 U.S.C. § 201 *et seq.*, to enjoin Sabine Irrigation Co., Inc. (Sabine), Charles H. Alberding and Joseph E. Scally from violating the Act's minimum wage requirement and to restrain them from continuing to withhold unpaid wages. Following a bench trial the district court entered judgment in favor of the Secretary against Alberding and Sabine, but dismissed the action against Scally. *Donovan v. Sabine Irrigation Co., Inc.*, 531 F.Supp. 923 (W.D.La.1981). Alberding alone appeals, contending that the district court erred in (1) holding that he was an employer within the meaning of Section 3(d) of the Act, 29 U.S.C. § 203(d), and as such had willfully violated the Act's minimum wage provisions throughout the period charged, and (2) imposing prospective and restitutionary injunctions. Finding no merit in these contentions, we affirm.

Background Facts

Sabine, a Louisiana corporation with its principal

office in St. Charles, Louisiana, was engaged until early 1979 in the business of supplying water for irrigation to rice farmers in Calcasieu Parish, Louisiana. Water was pumped from the Sabine River into a central canal, and then diverted into the rice fields. This water was vital to the production of the rice crop, the bulk of which was sold in interstate commerce. Sabine's employees operated the pumping station, inspected and repaired levees and constructed and maintained the bridges, gates, flumes and underpasses.

Alberding and a co-venturer each purchased one-half of Sabine's stock in the early 1950s. Alberding transferred this stock in the early 1960s, but continued as corporate president, a position he has held for over 30 years. During the pertinent period, Scally served as Sabine's vice-president and Alberding's wife, B. W. Alberding, was secretary-treasurer. Sabine Water Canal, Inc. (Sabine Canal) and Washington-Youree Corporation (Washington), Louisiana corporations managed by Alberding in the capacity of president, with Scally as vice-president and B. W. Alberding as secretary-treasurer, each acquired 50% of Sabine's stock sometime prior to 1976. Tucker Moore, Alberding's son-in-law, owns 100% of the stock in both Sabine Canal and Washington, and is employed as a hotel manager by Gulf Beach Club, Inc. Alberding owns the controlling interest in Gulf Beach and serves as its president.

The period covered in the Secretary's complaint extends from October 1976 to November 1978. Throughout this period, Sabine utilized a Tulsa, Oklahoma business address and shared a Tulsa office with Sabine Canal, Washington, and multiple other corporations owned and operated by Alberding, including the Tulsa Apartments Corporation, Hotel Services Company and Universal

Wholesale Supply Company. Primary responsibility for Sabine's daily operations was delegated to Joe Bond, on-site manager. Bond supervised the work crews until stricken with cancer in 1976, whereupon Gerald Clark assumed this duty. Mrs. Bond, who assisted her husband once he became ill and briefly held the post of general manager upon his death in April 1978, tabulated employee work hours and forwarded payroll work sheets to Miriam Covington, a 30-year employee of Hotel Services Company who managed the Tulsa office, and Shirley Goddard, an employee of Tulsa Apartments Corporation. Covington and Goddard regularly performed services for Sabine but were not on its payroll.

Due to the transient character of the workforce, the Bonds were allowed to compensate for the continuous turnover by filling vacant positions as they arose. However, the Bonds were not authorized to hire additional laborers, deviate from the $2.00 per hour pay rate established by the Tulsa office, write checks on Sabine's checking account with a St. Charles bank, or pay bills. The Tulsa office reimbursed the Bonds for any emergency purchases. Inquiries by sabine's suppliers regarding arrears in payment on trade accounts were directed to Tulsa. Any proceeds from the sale of rice received by the Bonds were transmitted to the Tulsa office or deposited in Sabine's account. Alberding's permission was required for special purchases, the addition of extra men to the workforce and the transfer of funds from one or more of his other corporations when needed to meet Sabine's payroll and trade obligations.

The district court described the Tulsa office's pervasive control of Sabine's affairs, and Alberding's role therein, as follows:

> At all times material to this action, Sabine's Tulsa office administered the business affairs of Sabine Irrigation Company and defendant Alberding maintained contact with the Tulsa office several times a week. Miriam Covington ... and Shirley Goddard ... were responsible for, and did pay, all bills incurred by Sabine Irrigation Company. If there were insufficient funds in the Sabine account, defendant Alberding would authorize Mrs. Covington to transfer funds from the Hotel Services account. On occasion, defendant Alberding would send a personal check or a check drawn on the account of some other corporation to cover the deficiency. All payroll checks for Sabine's employees were cut and mailed from the Tulsa office and all records regarding payment of Sabine's bills and payroll were kept in the Tulsa office. The Tulsa office deducted federal income tax and social security from the payroll and all records pertaining to these withholdings were kept in the Tulsa office. The Tulsa office handled all insurance arrangements for Sabine Irrigation and ensured that all ad valorem taxes were paid on Sabine real estate. Finally, the Tulsa office handled all Sabine's income tax returns.

531 F.Supp. at 926-27 (citations omitted).

Evidence of numerous ledger transactions reflecting the transfer of funds between Sabine, Alberding, Scally, or one of the many corporations owned and/or controlled by Alberding was offered at trial. According to the record, Sabine advanced sums toward the rent of Alberding's Chicago office, made a substantial loan and paid unidentified "fees" to one or more of Alberding's corporations, and shifted the benefit of a $12,000 crop damage loss to Alberding. Regardless of whether these and other adjustment entires in Sabine's books involved mere "paper"

transfers or actual exchanges of funds, they tend to show Alberding's dominion over Sabine's financial affairs.

A decline in the world rice market during the post-Vietnam War era caused a devastating reversal of Sabine's fortunes. Only infusions of capital by Alberding, commencing in 1976, saved the corporation from financial collapse. Sabine ceased doing business in early 1979, when Alberding discontinued monetary support, but remains a viable corporate entity.

Based on these facts, the district court concluded that Alberding was an employer, with Sabine, of the corporation's irrigation personnel and enjoined both defendants from future violations of the FSLA's minimum wage provisions and from failing to make restitution of backpay accruing from October 1976 to January 1979. Appellant Alberding concedes that Sabine is an employer covered by the Act, and that it did not comply with federal minimum wage requirements in the years complained of,[1] but argues that he is not an employer, that even if he were, his transgressions were not willful for purposes of the application of the three-year limitations and, finally, that the issuance of the injunction was improper.

Employer

[1] An "employer" is defined under Section 3(d) of the Act as including "any person acting directly in the interest of an employer in relation to an employee." This term has been interpreted to encompass one or more joint employers, *Falk v. Brennan*, 414 U.S. 190, 94 S.Ct. 427, 38

[1] Sabine's employees were paid $2.00 per hour from October 1976 through November 1978, whereas the minimum wage was $2.20 per hour in 1976, $2.30 per hour in 1977 and $2.65 per hour in 1978.

L.Ed.2d 406 (1973); *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668 (5th Cir.1968). 29 C.F.R. § 791.2 (1982). Whether a party is an employer or joint employer for purposes of the FSLA is essentially a question of fact; accordingly, appellate review is subject to the clearly erroneous standard.

[2,3] Our determination of Alberding's status is not circumscribed by formalistic labels or common-law notions of the employment relationship, *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir.1975). Instead, our analysis must focus upon the totality of the circumstances, underscoring the economic realities of the irrigation workers' employment. *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748 (1978); *Hodgson v. Griffin and Brand of McAllen, Inc. See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). In so doing, we adhere to the firmly-established guidon that the FLSA must be liberally construed to effectuate Congress' remedial intent. *Donovan v. Janitorial Services, Inc.*, 672 F.2d 528 (5th Cir.1982); *Donovan v. I-20 Motels, Inc.*, 664 F.2d 957 (5th Cir. 1981).

[4,5] Alberding maintains that as nominal president of Sabine he may not be held accountable for FLSA infractions simply because his monetary transfusions enable Sabine to stave off bankruptcy, there being no evidence that he owned stock in the company or exerted supervisory control over daily corporate operations. Respecting the first argument, we perceive the parameters of § 203(d) as sufficiently broad to encompass an individual who, though lacking a possessory interest in the "employer" corpora-

tion, effectively dominates its administration or otherwise acts, or has the power to act, on behalf of the corporation vis-a-vis its employees.[2] Assuming *arguendo* that Alberding had no authority to direct Sabine's activities, he would remain accountable for violations of the FLSA if he independently exercised control over the work situation. *See Hodgson v. Griffin and Brand of McAllen, Inc.; Shultz v. Falk*, 439 F.2d 340 (4th Cir.1971), *rev'd on other grounds sub nom, Falk v. Brennan*, 414 U.S. 190, 94 S.Ct. 427, 38 L.Ed.2d 406 (1972).

[6] Contrary to appellant's suggestion, neither the Act nor jurisprudence designates stock ownership in a corporate employer as the *sine qua non* of employer status where other forms of control of the employment relationship have been proven. No one factor is dispositive; rather, it is incumbent upon the courts to transcend traditional concepts of the employer-employee relationship and assess the economic realities presented by the facts of each case. *See Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961).

[7] Guided by this precept, we are persuaded that the district court properly resolved the question of Alberding's status:

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[2] As noted above, Tucker Moore, Alberding's son-in-law and an employee of a corporation of which Alberding is majority stockholder and president, owns all stock in Sabine by virtue of his ownership of Sabine Canal and Washington. *Compare Donovan v. Janitorial Services, Inc.* (where individual defendant owned no stock in subject corporation, but his spouse owned 35% of employer company and otherwise controlled its operations through his wholly-owned corporations, said defendant was deemed to be an employer of subject company's personnel). Regardless of the locus of title to Sabine's stock and the nature and extent of Alberding's control or ability to control its titular holder, Moore, the economic realities extant herein dictate that we view Alberding's substantial investment in the corporation as giving rise to strong inference of his control of Sabine's business and financial affairs.

> Since 1976, Mr. Alberding, through his employee Miriam Covington, has exercised pervasive control over the business and financial affairs of Sabine Irrigation. The evidence is clear that Mr. Alberding maintained continuous contact with his Tulsa office and indirectly controlled many matters traditionally handled by an employer in relation to an employee (such as payroll, insurance, and income tax matters). In addition, the evidence is clear that Mr. Alberding's financial gymnastics directly affected Sabine's employees by making it possible for Sabine to meet its payroll and keep its employees supplied with the equipment and materials necessary to perform their jobs. Thus, we hold that Mr. Alberding is an employer within the meaning of the Act and therefore personally liable along with Sabine Irrigation Co. for any wages found to be due and owing to the employees in question.

531 F.Supp. at 929.

The trial court discounted appellant's self-serving disavowals of involvement in Sabine's operations. Instead, the court credited the substantial evidence of Sabine's symbiotic association with various corporations owned and/or managed by Alberding, and the latter's dominion over the Tulsa office and resultant authority, however indirect, over the conduct of Sabine's business, including all significant phases of its relationship with the irrigation personnel. While the Bonds may have performed many of the functions of an employer, ultimate control was vested in Alberding. *Donovan v. Janitorial Services, Inc.; Shultz v. Mack Farland & Sons Roofling Co., Inc.*, 413 F.2d 1296 (5th Cir.1969). The corporation's very survival depended upon Alberding's largesse, with his decision to terminate all financial aid precipitating its near-demise. On the

present record, we are convinced that the district court correctly found that Alberding was an employer within the purview of the Act.

Willfulness

An action for delinquent minimum wage payments is foreclosed unless instituted within two years after the cause of action accrues, except where the defendant's noncompliance was willful, in which case the action may be commenced within three years after said accrual. Section 6(a) of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. § 255(a). The Secretary filed suit against Sabine, Alberding, and Scally in October 1979. Alberding contests the trial court's finding of willfulness and consequent application of the three-year limitation period. He supports this contention by advancing the argument that he cannot be deemed a statutory employer. We are not persuaded.

[8,9] As we noted in *Coleman v. Jiffy-June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972), the "test" for willfulness entails a determination of whether "there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, ... the test should be: Did the employer know the FLSA was in the picture?" Or, as we opined in *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir.1974) (emphasis in the original), "an employer acts willfully and subjects himself to the three year liability if he knows, or has reason to know, that his conduct is *governed* by the Fair Labor Standards Act." *See also Donovan v. Grantham*, 690 F.2d 453 (5th Cir.1982); *Hill v. J.C. Penney Co., Inc.*, 688 F.2d 370 (5th Cir.1981). Neither an employer's good faith nor his ignorance of the governing

statutes or regulations precludes a finding of willfulness. *Brennan v. Heard. See Hill v. J.C. Penney Co., Inc.; Marshall v. Union Pacific Motor Freight Co.*, 650 F.2d 1085 (9th Cir.1981).

[10] When measured against these standards, the evidence of appellant's disregard of the Act's minimum wage requirements is adequate to establish willfulness, thereby triggering the three-year liability provision. Sabine was investigated by the Wage and Hour Division of the Department of Labor in 1971, and the Act's proscriptions were then explained. Alberding and Scally were named defendants in three FLSA actions brought by the Secretary,[3] one of which culminated in a stipulation of compliance and dismissal. Alberding's protestation that he was unaware of the 1974 amendments revoking the prior exemption for irrigation laborers is of no avail, given his general knowledge that the FLSA was in the picture. *Donovan v. Grantham; Coleman v. Jiffy-June Farms, Inc.*

Injunctive Relief

[11-13] Finally, appellant contends that the district court abused its discretion in restraining him from future violations of the FLSA and from withholding payment of statutory minimum wages adjudged due and owing. Section 17 of the FLSA, 29 U.S.C. § 217,[4] authorizes the

[3] *Brennan v. Rolling Hills Management Corp.*, Docket # 71-C-240 (N.D.Okla.1971); *Dunlop v. Tulsa Apt. Co.*, Civil Action # 73-C-309 (N.D.Okla.1973); *Dunlop v. McAlester Corp.*, Civil Action # 75-117-C (E.D.Okla.1975).

[4] Under Section 17 of the Act, 29 U.S.C. § 217:

> The district courts, ... shall have jurisdiction, for cause shown, to restrain violations of section 15 [29 U.S.C. § 215],

district courts to issue both prospective and restitutionary injunctions. *Donovan v. Brown Equipment and Service Tools, Inc.*, 666 F.2d 148 (5th Cir.1982). Where a corporate officer has been found to have acted "directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), he may be enjoined along with the corporate employer, *Donovan v. Hamm's Drive Inn*, 661 F.2d 316 (5th Cir.1981), even though he no longer falls within the statutory definition at the time the action is initiated. *Donovan v. American Leader Newspapers, Inc.*, 524 F.Supp. 1144 (M.D. Fla.1981); *Wirtz v. Soft Drinks of Shreveport, Inc.*, 336 F.Supp. 950 (W.D.La.1971). Generally speaking, the propriety of a grant of injunctive relief in a §217 action is an equitable matter, committed in the first instance to the sound discretion of the district court. *Shultz v. Parke*, 413 F.2d 1364 (5th Cir.1969).

[14-16] Once a finding of past due wages is made, however, the district court's discretion to refuse the Secretary's request for a restitutionary injunction is limited, and must be tempered by considering whether the prerequisites for this remedy have been met and the policy reasons underlying Congress' enactment of the legislation have been fulfilled. *Donovan v. Grantham; Donovan v. Brown Equipment and Service Tools, Inc.* Thus the court must ascertain whether an injunction commanding restitution of delinquent back-pay furthers the FLSA's twin purposes of compensating the injured employees, and of redressing a continuing public wrong by depriving a violator

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(Footnote 4 continued)

> including in the case of violations of section 15(a)(2), [29 U.S.C. § 215(a)(2), rendering unlawful the failure to comply with minimum wage and overtime strictures of the Act], the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act ....

of any gains accruing to him through his violations, and protecting those employers who comply with the Act's wage requirements from having to compete unfavorably with those who do not. *Donovan v. Brown Equipment and Service Tools, Inc.*, 666 F.2d at 157. When examined against this background, the district court's imposition of a restitutionary injunction was within his statutorily prescribed discretion. This remedy did not penalize Alberding, but simply compelled his remission of wages to which his former employees were clearly entitled.

[17,18] In deciding whether to issue a prospective injunction, the district court must evaluate the previous conduct of the employer and the dependability of his promises for future compliance. In light of the evidence presented, including the proliferation of FLSA suits brought against Alberding and his corporations within a five-year period, and the limited efforts to conform to legislative strictures, we conclude that the district court properly enjoined appellant from further noncompliance with the Act.

AFFIRMED.

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No. 82-1679

In the Supreme Court of the United States

OCTOBER TERM, 1982

C. H. ALBERDING, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a corporation president who owned no stock in the corporation but exercised pervasive control over its operations, was an "employer" within the meaning of Section 3(d) of the Fair Labor Standards Act, 29 U.S.C. 203(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A23-A35) is reported at 695 F.2d 190. The memorandum ruling of the district court (Pet. App. A1-A15) is reported at 531 F. Supp. 923.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1983. The petition for a writ of certiorari was filed on April 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the president of Sabine Irrigation Company, a Louisiana corporation engaged in the business of supplying water for the irrigation of rice fields (Pet. App. A3, A24-A25). Petitioner did not directly own stock in

Sabine, but he controlled many of Sabine's financial affairs and the operations of other related corporations through a central office in Tulsa, Oklahoma (*id.* at A4-A5, A11, A26, A31).[1]

Employees in the Tulsa office, who had worked for petitioner for many years, regularly performed services for Sabine, such as paying its bills, cutting and mailing payroll checks for its employees, maintaining its business records, deducting federal income tax and social security from its payroll, handling its insurance arrangements, ensuring that ad valorem taxes were paid on its property and filing its income tax returns (Pet. App. A7, A26-A27). Petitioner authorized numerous transfers of funds among his corporations, including Sabine (*id.* at A8-A9, A26-A27). An on-site manager supervised Sabine's day-to-day operations, but he was not empowered to deviate from the $2.00 per hour subminimum wage rate set by the Tulsa office for Sabine's employees, or to increase the company's workforce, or to write checks, even on the company's local bank account (*id.* at A26).

2. The Secretary of Labor brought this action in the United States District Court for the Western District of Louisiana under the Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.* (*"FLSA"*), to enjoin Sabine, petitioner and J. E. Scally, a vice president of Sabine, from violating the Act's minimum wage provisions and to compel

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[1]Petitioner and a co-venturer each purchased one-half of Sabine's stock in the early 1950s (Pet. App. A25). Petitioner transferred his stock in the early 1960s, but continued as corporate president (*ibid.*). Two other companies managed by petitioner in his capacity as president acquired 100% of Sabine's stock prior to 1976 (*id.* at A5, A25). Tucker Moore, petitioner's son-in-law, owned all the stock in those two corporations and worked for yet another corporation controlled and managed by petitioner (*ibid.*).

payment of back wages due their employees (Pet. App. A1-A2, A23). After trial, the district court held that "there can be no doubt" that petitioner, along with Sabine, was an employer within the meaning of the Fair Labor Standards Act because of his long-time status as president of Sabine and his exercise, through his employees in the Tulsa office, of "pervasive control over the business and financial affairs of Sabine Irrigation" (Pet. App. A10-A11).[2]

The court of appeals affirmed (Pet. App. A21-A35). The court reasoned that in deciding whether petitioner was an employer, "formalistic labels or common-law notions of the employment relationship" should be rejected in favor of review of "the totality of the circumstances, underscoring the economic realities of the irrigation workers' employment" (*id.* at A29). The court expressly rejected petitioner's contention that he could not be held accountable for FLSA infractions because he lacked an ownership interest in Sabine; the court reasoned that "neither the Act nor jurisprudence designates stock ownership in a corporate employer as the *sine qua non* of employer status where other forms of control of the employment relationship have been proven" (Pet. App. at A30). On the issue of petitioner's control of Sabine, the court of appeals held that the district court properly discounted petitioner's "self-serving disavowals of involvement in Sabine's operations"; to the contrary, the court of appeals found "substantial evidence of * * * authority, however indirect, over the conduct of Sabine's business, including all significant phases of its relationship with the irrigation personnel" (*id.* at A31). Accordingly, the court of appeals concluded that the district court's finding that petitioner was an employer was correct on the facts (*id.* at A28-A31).

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[2]The action against Scally was dismissed after trial (Pet. App. A17).

ARGUMENT

Petitioner contends (Pet. 6-10) that because he owned no stock in Sabine and did not directly manage its business,[3] the courts below erred in holding that he was an employer within the meaning of Section 3(d) of the Fair Labor Standards Act, 29 U.S.C. 203(d).[4] This contention, which involves no more than the fact-bound application of well-settled principles, is without merit and does not warrant further review.

In determining whether the evidence of petitioner's control over Sabine brought him within the FLSA's definition of an employer, the court of appeals correctly followed the uniform decisions of other courts of appeals and examined the "totality of the circumstances" concerning the economic reality of the employment relationship. See *Castillo* v. *Givens*, 704 F.2d 181, 188-192 (5th Cir. 1983); *Real* v. *Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754-755 (9th Cir. 1979); *Hodgson* v. *Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973), cert. denied, 414 U.S. 819 (1973). See also *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947). The court correctly viewed petitioner's technical lack of ownership as merely one factor to be weighed in determining liability under the Act and rejected petitioner's contention that he could not be an employer unless he owned stock in Sabine or directly managed its operations. See *Falk* v. *Brennan*, 414 U.S. 190, 195

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[3]Petitioner asserts (Pet. 7) that he "never participated in the supervision of the company's operations." The district court found otherwise, and the court of appeals held that the finding was supported by the record. Petitioner's challenge to this factual finding does not warrant review by this Court.

[4]Section 6 of the FLSA, 29 U.S.C. (& Supp. V) 206, the Act's minimum wage provision, is specifically directed to "every employer," and Section 3(d), 29 U.S.C. 203(d), defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee * * *."

(1973); *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296, 1300 (5th Cir. 1969); *Lenroot* v. *Interstate Bakeries Corp.*, 146 F.2d 325, 328 (8th Cir. 1945).

Contrary to petitioner's claim (Pet. 11), the determination that he was an employer within the meaning of the Act notwithstanding his lack of stock ownership does not conflict with the decision of any other court of appeals.[5] Petitioner's reliance (Pet. 7-8) on *Wirtz* v. *Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963), is misplaced. The defendant in *Pure Ice* was a mere investor who had "nothing to do" with any decisions affecting the wages and hours of the employees and who was totally oblivious to events at the workplace. *Id.* at 263. Obviously, that defendant's situation is readily distinguishable from petitioner's extensive involvement in the financial affairs and management of Sabine.[6]

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[5] *Shultz* v. *Mack Farland & Sons Roofing Co.*, 413 F.2d 1296 (5th Cir. 1969), cited by petitioner (Pet. 8), actually supports the holding of the court of appeals in this case and in fact was relied upon in the opinion below on the question of whether petitioner exercised sufficient, albeit indirect, control of Sabine to be regarded as an employer (Pet. App. A31). On the issue of stock ownership, *Mack Farland* merely indicates that ownership is but one factor among many to be considered when examining employment status under the FLSA.

[6] Petitioner's argument (Pet. 9-10) that Sabine was not a part of an "enterprise" with the various other corporations he owned or controlled is irrelevant to the issue of whether he was an employer of Sabine's employees. The activities of the other corporations are pertinent only insofar as their interrelationship and complex financial dealings, all under petitioner's direction, established his personal control over Sabine's affairs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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